MMIP SERVICES SDN BHD & ORS v. WEE CHYE HEE & ORS

HIGH COURT MALAYA, SHAH ALAM
JULIE LACK J
[ORIGINATING SUMMONS NO: BA-24NCVC-1432-11-2018]
10 JANUARY 2023

Abstract – *(i) A party who makes an ex parte application to the court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge. Failure to do so may be fatal; (ii) The issue of forum non conveniens is a serious and difficult question and should be adjudicated in inter parte proceedings. In this case, whether the forum non conveniens favour proceedings in Malaysia or Singapore will have to be argued, considered and decided when the originating summons is heard inter partes.*

CIVIL PROCEDURE: *Judgments and orders – Ex parte order – Setting aside – Whether declarations in ex parte order defeat foreign proceedings and judgment – Failure to make full and frank disclosure – Whether fatal – Whether rules of natural justice complied with – Whether reasons advanced for originating summons to be heard ex parte unwarranted and untenable – Whether parties severely prejudiced – Whether there was serious defect in manner of obtaining ex parte order – Whether ex parte order could be sustained*

CIVIL PROCEDURE: *Jurisdiction – High Court in Malaysia or High Court in Singapore – Forum non conveniens – Whether best to be adjudicated in inter parte proceedings*

The defendants were Singapore citizens who were passengers in a double decker motorbus from Genting Highlands bound for Singapore. The motorbus driven by the third applicant, owned by the second applicant and insured by the first applicant, was involved in an accident on the Karak Highway near Kuala Lumpur. As a result of the accident, the defendants sustained serious injuries. They sought medical treatment initially at Hospital Kuala Lumpur and subsequently at NUH Singapore. The defendants filed civil suits against the second and third applicants in the Singapore court claiming damages for injuries and losses sustained as a result of the road accident. Notice of commencement of the defendants' civil suits in Singapore was served on the first applicant. The first applicant referred the matter to its solicitors and were advised that the Singapore court had no jurisdiction to hear the case as the cause of action had occurred in Malaysia. The solicitors proposed that the defendants' solicitors withdraw their Singapore suits and refile them in the Sessions Court at Selayang, Selangor. The defendants disagreed with that proposal and proceeded to enter judgment in default against the second and third applicants. Subsequently, the second and

A third applicants successfully applied to set aside the default judgments and filed their defences to defend the claims in the Singapore High Court. The proceedings against the second and third applicants proceeded to trial. As the third applicant did not attend the trial, judgment on liability with damages to be assessed was granted against the third applicant. The applicants filed
B this originating summons ('OS') at the Shah Alam High Court and obtained an *ex parte* order dated 24 January 2019, that stated *inter alia*: (i) a declaration that the cause of action arose out of the road accident at KM31.1 Karak Highway and therefore the subordinate court in Malaysia has the sole jurisdiction to hear the claimant's claim; and (ii) a declaration that the
C claimants were not liable to pay any judgment sum that was obtained/given by the High Court/Subordinate Court Singapore against the driver and/or registered owner of the motorbus. The first applicant served the *ex parte* order on the defendants. The defendants applied to intervene and set aside the *ex parte* order (encls. 24 and 31). In supporting the applications, the defendants
D submitted that: (i) the applicants obtained the *ex parte* order for the collateral/direct purpose of defeating the Singapore civil suits; (ii) the Singapore court had the jurisdiction to hear the Singapore suits; (iii) the Singapore court was the more appropriate *forum* to hear the defendants' claim in respect of the accident; and (iv) there was no full and frank disclosure by the applicants in obtaining the *ex parte* order.

E **Held (allowing applications in encls. 24 and 31; setting aside *ex parte* order):**

(1) This court retains the power and the jurisdiction to set aside an order of another judge of concurrent jurisdiction on such terms as it thinks fit. This court was not *functus officio* in this matter. (para 31)

F **(2)** A party who makes an *ex parte* application to the court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge and failure to do so may be fatal. The applicants failed to make a full and frank disclosure of all the relevant matters that were pertinent. The applicants have not made the fullest possible
G disclosure of all the material facts within their knowledge. The most pertinent facts which were left out would be: (i) that the bus tickets were purchased in Singapore from Grassland Express & Tours Pte Ltd or Grassland Express Pte Ltd by all the defendants who were Singapore citizens permanently residing in Singapore; (ii) the defendants were
H treated in hospitals in Singapore. The number of witnesses giving evidence on behalf of the defendants surpassed the number of witnesses giving evidence for the applicants; (iii) the applicants have entered their defences in the Singapore suits and the Singapore suits have proceeded to trial and judgments against the second and third applicants have been
I granted after a full trial; and (iv) the Singapore judgments remained as valid judgments. It was not the right of the applicants to make the decision whether to incorporate or to cut out those details into their

affidavit in support. It would have been better to include those facts and leave it to the discretion of the court as to whether these were material enough facts for the court's consideration. (paras 35-37)

(3) The court must receive the most complete and unsuppressed facts in order for it to make an informed and fair decision on the outcome of the application. Only then can the applicants meaningfully claim that they had crossed the threshold of full and frank disclosure and they had discharged their duty. The court must be given a complete picture of the material facts. Lamentably those material facts were not disclosed. How is the court to embark upon adjudicating on the matter when it cannot evaluate the strength of either party's case? The applicants had abysmally failed to comply with the rules of natural justice. The applicants should have served the OS on the defendants. The reasons advanced by the applicants for the OS to be heard *ex parte* were unwarranted and untenable. The defendants must be accorded the right to be heard as their legal rights will certainly be affected. The defendants have been severely prejudiced from the stealth with which the order was obtained. (paras 40-42)

(4) The applicants were aware of the Singapore suits prior to the filing of OS. At the material time, the applicants had entered their defences in the Singapore suits. The applicants have had their chance to contest the Singapore suits and to defend themselves which they did so. The applicants could not now be allowed to take the 'back doorway' of obtaining a blanket declaration that they would not be liable to satisfy any judgment meted out by the Singapore court in regard to the accident. The declarations in the *ex parte* order would inevitably have the effect of defeating a foreign proceeding and judgment. This amounted to an abuse of the declaratory procedure for a collateral purpose as well as a surefire way of defeating the Singapore suits and the judgments allowed by the Singapore court which were granted after a full trial. There was a serious defect in the manner of obtaining the *ex parte* order which called for the same to be set aside in order for all parties to be heard and to enable this court to do justice. The *ex parte* order thus could not be sustained and must be set aside in order for the parties to properly ventilate on all the pertinent issues. (paras 48-51)

(5) Whilst the issue of *forum non conveniens* is an important if not the most dominant factor in the OS proceedings, it is best to be adjudicated in *inter parte* proceedings. The issue of *forum non conveniens* is a serious question and difficult questions such as this should not be determined at this stage of the proceedings. Whether the *forum non conveniens* favours proceedings in Malaysia or Singapore will have to be argued, considered and decided after the *ex parte* order is set aside and when the OS is heard *inter partes.* (para 57)

Case(s) referred to:

AmGeneral Insurance Bhd v. Sa'Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175 FC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(refd)***

Datuk M Kayveas v. PV Das [1997] 4 CLJ 544 CA ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1978] CLJU 44; [1978] 1 LNS 44 FC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] CLJU 21; [1982] 1 LNS 21 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239 CA ***(refd)***

Lai Cheng Ooi v. Lim San Peen & Anor And Other Appeals [2018] 7 CLJ 145 FC ***(refd)***

Lee Phet Boon v. Hock Thai Finance Corporation Bhd [1994] 3 CLJ 466 HC ***(refd)***

Mohamad Rafiq Muiz Ahmad Hanipah v. Pacific & Orient Insurance Co Bhd & Ors [2018] CLJU 942; [2018] 1 LNS 942 HC ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 96(3)

For the applicants - Silva Velu, JS Naicker & Monisha Pandey; M/s Silva Velu & Co
For the defendants - Witter Yee & Quek Juan Long; M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

Julie Lack J:

[1] This judgment is in respect of two applications before this court, the particulars of which are as follows:

(i) enclosure 24: notice of application by Wee Chye Hee and others to set aside the *ex parte* order of the Shah Alam High Court dated 21 April 2019; and

(ii) enclosure 31: notice of application by R Manokaran & Ors to set aside the *ex parte* order of the Shah Alam High Court dated 21 April 2019.

[2] Both applications were heard and determined together.

[3] After hearing parties, I allowed both applications. The applicants are aggrieved with the said decision and have appealed.

[4] These are the reasons for my decision.

Background Facts

[5] The defendants are Singapore citizens.

[6] On 31 August 2016 at around 4pm, the defendants were passengers in a double-decker motorbus bearing Malaysian registration no. PKF 2122 from Genting Highlands bound for Singapore.

[7] At the material time, the motorbus was driven by the third applicant, owned by the second applicant and insured by the first applicant.

[8] The motorbus was involved in an accident at KM 31.3 of the Karak Highway near Kuala Lumpur. As a result of the accident, the defendants sustained serious injuries. They sought medical treatment initially at Hospital Kuala Lumpur and subsequently at NUH Singapore.

[9] The defendants filed civil suits against the second and third applicants in the Singapore Court claiming damages for injuries and losses sustained as a result of the road accident.

[10] Notice of commencement of the defendants' civil suits in Singapore was served on the first applicant. The first applicant confirmed insurance coverage and referred the matter to its solicitors and were advised that the Singapore Court had no jurisdiction to hear the case as the cause of action had occurred in Malaysia.

[11] The solicitors proposed that the defendants' solicitors withdraw their Singapore suits and refile them in the Sessions Court at Selayang, Selangor.

[12] The defendants disagreed with that proposal and proceeded to enter judgment in default against the second and third applicants.

[13] Subsequently, the second and third applicants successfully applied to set aside the default judgments and filed their defences to defend the claims in the Singapore High Court. The proceedings against the second and third applicants proceeded to trial.

[14] As the third applicant did not attend the trial, judgment on liability with damages to be assessed was granted against the third applicant on 3 August 2021, on merits based on affidavits which were submitted as evidence.

[15] On 22 November 2018, the applicants filed this originating summons at the Shah Alam High Court and obtained an *ex parte* order dated 24 January 2019.

[16] The *ex parte* order states as follows:

(i) a declaration that the cause of action arose out of the road accident on 31 August 2016 involving motorbus No. PKF 2122 at KM31.1 Karak Highway and therefore, the subordinate court in Malaysia has the sole jurisdiction to hear the claimant's claim;

(ii) a declaration that the Magistrates'/Sessions Court of Selayang is the subordinate court in Malaysia that has the sole jurisdiction to hear this action since the cause of action arose out of the road accident that

occurred at KM 31.3 Karak Highway which is under the investigation jurisdiction of Gombak Traffic Department and the Magistrates'/ Sessions Court of Selayang has the sole jurisdiction to hear the claimant's claim;

(iii) a declaration that the claimants are not liable to pay any judgment sum that is obtained/given by the High Court/Subordinate Court Singapore against the driver and/or registered owner of the motorbus No. PKF 2122; and

(iv) the applicants shall bear the costs of this application.

[17] The first applicant's solicitors served the *ex parte* order on the defendants' solicitors in Singapore on 30 May 2019.

[18] The defendants' solicitors applied to intervene and set aside the *ex parte* order dated 21 April 2019. The Shah Alam High Court heard these applications and dismissed them with costs.

[19] The defendants' appealed against that decision to the Court of Appeal. On appeal, the Court of Appeal overturned the decision and the defendants were added as defendants in this OS. The Court of Appeal ordered that encls. 24 and 31 be remitted to the High Court for hearing on its merits.

Summary Of The Defendants' Submissions

[20] In supporting both applications, the defendants have submitted that the *ex parte* order dated 24 January 2019 should be set aside on the following grounds:

(i) the applicants obtained the *ex parte* order for the collateral/direct purpose of defeating the Singapore civil suits;

(ii) the Singapore Court has the jurisdiction to hear the Singapore suits;

(iii) the Singapore Court is the more appropriate *forum* to hear the defendants' claim in respect of the accident; and

(iv) there was no full and frank disclosure by the applicants in obtaining the *ex parte* order.

Summary Of The Applicants' Submissions

[21] The gist of the applicants' contentions in resisting the applications are:

(i) the High Court's jurisdiction to make an *ex parte* order is unlimited, one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction;

(ii) the defendants do not come within the definition of "plaintiff" under s. 96(3) of the Road Transport Act 1987 and therefore there was no requirement in law to notify the defendants of the intended filing of the *ex parte* application;

(iii) the Malaysian courts is the more appropriate *forum* to hear the accident claim; and

(iv) the defendants cannot be allowed to "*forum* shop".

Decision Of The Court

[22] The main issue for this court to consider is whether the defendants have cause to set aside the *ex parte* order of court dated 24 January 2019. To recapitulate, the applicants have in their submissions contended that the High Court's jurisdiction to make an *ex parte* order is unlimited subject only to its own discretion. Further, it was submitted that one High Court Judge cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. Counsel for the applicant referred to the case of *Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor* [1978] CLJU 44; [1978] 1 LNS 44; [1979] 2 MLJ 101 to support that stance.

[23] This court is satisfied that when the learned judge heard the originating summons (OS) in encl. 1, it was an *ex parte* application and it is to be presumed that at that point in time, the court was satisfied that encl. 1 was granted based on the evidence tendered and presented by the applicants.

[24] It is pertinent to note that the OS was intentionally not served on the defendants. The reason given was in view of the urgency of the matter and that to serve the OS would have dragged the matter longer than was necessary bearing in mind the defendants had already commenced their respective civil suits in Singapore. It was thus contended that it was in the interest of justice for the matter to remain *ex parte* instead of being converted into an *inter parte* hearing.

[25] I do not find merits in the reasons advanced by the applicants' nor do I find their reliance on the case of *Datuk Syed Kechik* (*supra*) to be of any help to their case. The case referred to by the applicants was about the court's jurisdiction when making declaratory orders which the Federal Court stated should be exercised 'sparingly' with 'great care and jealousy,' with 'extreme caution' and with 'the utmost caution.'

[26] Here what is significant is that the basis for both the applications to set aside the *ex parte* order is the argument that it was obtained in breach of rules of natural justice. It was argued that where the *ex parte* order has been obtained in breach of the rules of natural justice, such order can and will be set aside by the court. This court has no quarrel with the principle stated therein. The cornerstone for this view is supported by the Federal Court decision in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. The Federal Court has made in clear beyond doubt of the following:

A It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack B of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have C set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give the judge a discretion as to the order he will make'.

D **[27]** The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement E of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] CLJU 21; [1982] 1 LNS 21; [1982] 2 MLJ 37 at p. 39 provides the correct guideline on the subject:

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be F successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

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For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving order which contravened 'any written law', the contravention should be one which H defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there I is a real need to set aside the defective order to enable the court to do

justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[28] In this regard, the case of *Datuk M Kayveas v. PV Das* [1997] 4 CLJ 544; [1997] 3 MLJ 678 also serves as a useful reminder, particularly where Mahadev Shanker JCA said:

> Notwithstanding s. 67 of the Courts of Judicature Act, 1964, the proper remedy in the High Court for a party aggrieved by an order made *ex parte* in his absence is not to appeal but to apply to have it set aside by the judge who made it (see O.13 r. 8, O. 14 r. 11, O 19 r. 9, O. 32 r. 6 or O. 35 r. 2 of the RHC read with r. 14 of the Rules).
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> Counsel also referred to the Malaysian Court Practice High Court Vol 1, a publication of the Malayan Law Journal, in relation to O. 32 r. 6 of the RHC found at pp. 2255 - 2256 which read:
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> > This rule protects the basic right accorded to litigants, that a party who has not had an opportunity of being heard may apply to the court to discharge an order obtained in his absence (*Boyle v. Sacker* [1888] 39 Ch D 249 at p 251).
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> 32.6.2) Setting aside an *ex parte* order:
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> > After issuing an *ex parte* order, a judge does not become *functus officio*. Under O. 28 r. 4(1) (originating summons procedure), the *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. An application to set aside an *ex parte* order is not an appeal so as to require a court of superior jurisdiction to deal with it; a court of coordinate jurisdiction may exercise the power; see *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1994] 3 CLJ 466; [1994] 1 MLJ 448 and *Datuk M Kayveas v. PV Dass* [1997] 4 CLJ 544; [1997] 3 MLJ 671 (CA).

[29] In the case of *Lee Phet Boon v. Hock Thai Finance Corporation Bhd* [1994] 3 CLJ 466 the Court held that:

> (1) The judge was not *functus officio* because his order was not a final order as it was made *ex parte*. Under O. 28 r. 4(1), the *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit, and, under O. 32 r. 6, such an order may be set aside by the court. An application to set aside an *ex parte* order is not an appeal which requires a court of superior jurisdiction to deal with it.

[30] In the case of *Lai Cheng Ooi v. Lim San Peen & Anor And Other Appeals* [2018] 7 CLJ 145 the Federal Court held that:

> (2) The principle that a judge has no power or jurisdiction to set aside an order of another judge of concurrent jurisdiction does not apply to *ex parte* orders. An order made *ex parte* maybe regular, in that, it was made within jurisdiction. But that does not mean that an *ex parte* order could not be set aside, be it by the same or different judge of the court which granted the *ex parte* order ...

[31] It is therefore unassailable that this court is not *functus officio* in this matter. It retains the power and the jurisdiction to set aside an order of another judge of concurrent jurisdiction on such terms as it thinks fit.

Whether There Was Full And Frank Disclosure By The Applicants In Obtaining The *Ex Parte* Order Dated 24 January 2019

[32] It is a basic principle applicable to all *ex parte* applications that a party seeking *ex parte* relief must make full and frank disclosure to the court of all material facts in order for that court to exercise its discretion whether to allow the order to be granted or not.

[33] In the case of *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd* [2009] 2 CLJ 445 the Court of Appeal held as follows:

> [20] It is an established general rule of law that when a party makes an *ex parte* application to the court of any kind, he must make a full and frank disclosure of all relevant matters. This general rule applies in particular to an *ex parte* application for extension of the validity of a writ; and an extension can be refused on this ground alone: per Lord Brandon of Oakbrook, speaking for the House of Lords in *Baly And Anor*, *supra*.
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> [21] In *The King v. The Special Commissioners for The Purposes of the Income Tax Acts for The District of Kensington, ex parte Princess Edmond De Plignac* [1917] 1 KB 486, 509, Warrington CJ held, *inter alia*, as perfectly well settled that a person who makes an *ex parte* application to the court ie in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by reason of the order which has thus wrongly been obtained by him.
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> [22] Within our shores, in *Creative Furnishing Sdn Bhd v. Wong Koi @ Wong Khoon Foh d/a Syarikat Sri Jaya* [1989] 2 CLJ 93, 96; [1989] 1 CLJ (Rep) 22 SC, Mohd Azmi SCJ (as he then was) explained that:
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> (1) In presenting affidavit evidence for an *ex parte* order, it is incumbent upon an applicant to make full and frank disclosure of all material facts;
>
> (2) Every material representation must not be misleading, and there must not be any suppression of material facts; and
>
> (3) Failure to do so at the crucial time of making the application would invariably be fatal.
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> [23] A similar sentiment was shown by Steve Shim J (later CJ SS) in *Yeoh Kee Aun*, *supra*, at p. 514 to the effect that where there is a failure to disclose material facts within his knowledge in an *ex parte* application by a party or where there is any material misrepresentation, it will result in the court setting aside the *ex parte* order obtained.

[24] I would respectfully add that the *raison d'tere*, for the aforesaid established general rule of law, is that an *ex parte* application is an application *uberrimae fidei ie* of the utmost good faith and the court has to rely on the unilateral version of the applicant who must candidly and faithfully tell the truth, the whole truth and nothing but the truth. Anything short of that utmost good faith will invariably render the *ex parte* application fundamentally flawed and on that ground alone, result in the inevitable setting aside of the *ex parte* order so obtained.

[34] In the Court of Appeal case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239, the same issue was before the court and the Court of Appeal held as follows:

It is trite law that in any *ex parte* application it is essential that there must be frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant. In *Siporex Trade SA v. Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 His Lordship Bingham J (As he then was) said this at p. 437:

Failure to make full and fair disclosure

... He must investigate the nature of the cause of action asserted and the facts relied on before applying and identifying any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and frank disclosure is not observed the court may discharge the injunction even if after full enquiry, the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. Most of these principles are established by authorities such as *Rex v. The Kensington Income Tax Commissioners* [1917] 1 KB 486; *Thermax Ltd v. Schott Industrial Glass Ltd* [1981] FSR 289; *Wardle Fabrics Ltd v. G Myristis Ltd* [1984] FSR 263; *Bank Mellat v. Nikpur* [1985] FSR 87. The other principles have not been the subject of detailed challenge.

[35] From the above authorities, it is clear that a party who makes an *ex parte* application to the court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge and failure to do so may be fatal.

[36] Having carefully considered the application and the affidavit in support as well as the facts and chronology of events, I am in complete agreement with the submissions of counsel for the defendants that the applicants here have failed to make a full and frank disclosure of all the relevant matters that are pertinent. I find that the applicants have not made the fullest possible disclosure of all the material facts within their knowledge.

The material facts referred to by the defendants in particular are those facts listed out in paras. 75 to 86 of the defendants' written submissions. The most pertinent facts which were left out would be:

- that the bus tickets were purchased in Singapore from Grassland Express & Tours Pte Ltd or Grassland Express Pte Ltd by all the defendants who are Singapore citizens permanently residing in Singapore;

- the defendants were treated in hospitals in Singapore. The number of witnesses giving evidence on behalf of the defendants surpasses the number of witnesses giving evidence for the applicants;

- the applicants have entered their defences in the Singapore Suits and the Singapore suits have proceeded to trial and judgments against the second and third applicants have been granted after a full trial;

- the Singapore judgments remain as valid judgments.

[37] I agree that there was no full and frank disclosure by the applicants of all facts which are material to the exercise of this court's discretion whether or not to grant the relief prayed for. It may be the facts not divulged were deemed not important enough to the applicants, still nevertheless it was not the right of the applicants to make the decision whether to incorporate or to cut out those details into their affidavit in support. It would have been better to include those facts and leave it to the discretion of the court as to whether these were material enough facts for the court's consideration. It may seem that those facts are not serious to the applicants but that would be for the court to evaluate and adjudicate on the matter.

[38] It would also be no excuse for the applicants to say that these were not material or that it had been inadvertently omitted.

[39] The court must receive the most complete and unsuppressed facts in order for it to make an informed and fair decision on the outcome of the application. Only then, can the applicants meaningfully claim that they had crossed the threshold of full and frank disclosure and they had discharged their duty.

[40] The court must be given a complete picture of the material facts. Lamentably, those material facts were not disclosed. How is the court to embark upon adjudicating on the matter when it can't evaluate the strength of either party's case?

[41] I also agree with the defendants that the applicants have abysmally failed to comply with rules of natural justice. The applicants should have served the OS on the defendants. The reasons advanced by the applicants for the OS to be heard *ex parte* are unwarranted and untenable. I cannot fathom nor can I accept learned counsel's justification for the order to be obtained *ex parte*.

[42] On this issue, it is my view that the defendants must be accorded the right to be heard as their legal rights will certainly be affected. I am respectfully of the view that the defendants have been severely prejudiced from the stealth with which the order was obtained. It had caused unnecessary waste of time and expenses to have the order set aside and to now be reheard.

[43] I find there was no urgency for the matter to be heard *ex parte* even though the defendants had already commenced a civil suit in the Singapore courts. Given that the Singapore suit had not been concluded at the material time, the defendants ought to be given the opportunity to address each and every allegation raised by the applicants. In all fairness, there was a necessity for the matter to be ventilated, deliberated and evaluated by the court before the reliefs claimed may be allowed. This entailed both the applicants and the defendants to be given ample opportunity to be heard and not only one party.

[44] The applicants knew the details and particulars of the solicitors acting for the defendants. There would have been no difficulty for the OS to be served on the solicitors and the matter be fixed for hearing. The excuse that it would complicate and delay the matter is misconceived and unacceptable.

[45] Moreover the applicants had been duly notified of every step of the proceedings in the Singapore suits. They were at liberty and had ample opportunity to conduct their challenge to the jurisdiction of the Singapore courts. Instead, they quietly and stealthily took out the *ex parte* order in the Malaysian courts. While the defendants exhibited good faith by informing the applicants of their proceedings, the applicants did not reciprocate. As I mentioned earlier, they took the decision instead to go to the Malaysian courts for relief.

[46] It was canvassed by the applicants that there was no prejudice caused to the defendants as the Malaysian courts had the jurisdiction to hear the matter. On the contrary, it is my view the defendants have been severely prejudiced by the granting of the *ex parte* order. Not only were they not given the opportunity to be heard but more significantly the applicants have obtained an order that they are not liable to pay any judgment sum that is obtained by the Singapore Courts in relation to the defendants' claim. The *ex parte* order is highly prejudicial to the defendants as the applicants will not be made liable to any judgment of the Singapore Courts against the driver and owner of the motorbus.

[47] It is significant that one of the defendants' grievance is that the applicants are using the *ex parte* declaratory order for not only a collateral purpose to defeat the Singapore suits, but in fact a direct purpose to defeat the Singapore suits. This was the remark passed by the panel of judges hearing the appeal at the Court of Appeal. I have no reason to disagree with that view.

[48] It is not disputed that the applicants were aware of the Singapore suits prior to the filing of OS. At the material time, the applicants had entered their defences in the Singapore suits. I am in agreement with the defendants that the applicants have had their chance to contest the Singapore suits and to defend themselves which they did so. The applicants cannot now be allowed to take the 'back doorway' of obtaining a blanket declaration that they will not be liable to satisfy any judgment meted out by the Singapore Court in regard to the accident.

[49] It is my considered view that the declarations in the *ex parte* order will inevitably have the effect of defeating a foreign proceeding and judgment. This amounts to an abuse of the declaratory procedure for a collateral purpose as well as a surefire way of defeating the Singapore suits and the judgments allowed by the Singapore court which were granted after a full trial. I can only say that this may have been the dominant motivation for seeking the *ex parte* order.

[50] On this score I find there is a serious defect in the manner of obtaining the *ex parte* order which calls for the same to be set aside in order for all parties to be heard and to enable this court to do justice. I believe my view is in accord with the principles laid down in the Court of Appeal case of *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 where the Court of Appeal had the occasion to remind judges on the nature of declaratory remedy and reliefs sought by litigants that come before them:

> Although s. 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v. Zauyah Wan Chik & Ors And Another Appeal* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v. Radcliffe Urban District Council* [1922] 2 Ch 490 at p.507 per Lord Sterndale MR), yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v. Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v. Lee Johnson* [1993] 1 SLR 313) or where it may be premature to grant a declaration (*Redifussion (Hong Kong) Ltd v. A.G of Hong Kong & Anor* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v. Lye Thai Sang & Anor* [1985] 2 MLJ 380) other inequitable conduct (*City of London v. Horner* [1914] 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral purpose (*Trawnik & Anor v. Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v. Griffiths* [1924] 1 KB 941 at p. 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.
>
> (emphasis added)

[51] That being the case, the *ex parte* order dated 21 April 2019 cannot be sustained and must be set aside in order for the parties to properly ventilate on all the pertinent issues.

Section 96(3) Of The Road Transport Act 1987

[52] The applicants have contended that there is no requirement in law for the applicants to notify the defendants of the intended filing of the *ex parte* application because the defendants do not come within the definition of the word "plaintiff" under s. 96(3) of the RTA that is to say they are not party in the "proceedings" in Malaysia. The applicants relied on the High Court decision of *Mohamad Rafiq Muiz Ahmad Hanipah v. Pacific & Orient Insurance Co Berhad & Ors* [2018] CLJU 942; [2018] 1 LNS 942 to support their contentions.

[53] Given its significance, s. 96(3) of the RTA is reproduced below:

> 96 Duty of insurers to satisfy judgments against persons insured in respect of third party risks
>
> (1) If, after a certificate of insurance has been delivered under **subsection 91(4)** to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> ....
>
> (2) No sum shall be payable by an insurer under subsection (1):
>
> ...
>
> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
>
> (emphasis added)

[54] More recently, the Federal Court had the occasion to consider on this issue when it came up in the case of *AmGeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals* [2022] 8 CLJ 175. The Federal Court explained the true import of s. 96(3) thus:

> Section 96(3) of the RTA speaks of a declaration obtained by the insurer" before the date the liability was incurred", meaning to say before judgment in the tortious claim by the third party claimant is obtained against the insured and the tortfeasor. To that extent the provision is clear and unambiguous, which explains why the first appellant proceeded with the application under s. 96(3) after the respondent had commenced the tortious claim against the insured rider and owner of the motorcycle (second appellant) in the Bandar Baru Bangi Magistrate's Court and before judgment was obtained by the respondent as the third party claimant.
>
> [95] The point to note is that while s. 96(3) gives the insurer the right to obtain a declaration that the insurance policy is void and unenforceable, s. 96(1) makes it mandatory for the insurer to make payment after judgment had been obtained against the insured by the third party claimant. Judgment here means judgment in an action for negligence filed by the third party claimant and not judgment in any other cause of action.
>
> [96] What s. 96(3) mandates is that where the insurer intends to repudiate liability under the policy, it must comply with the following procedural requirements:
>
> (i) notice must be given to the plaintiff in the tortious claim action before liability is incurred;
>
> (ii) the notice must state the grounds relied on by the insurer to obtain a declaration;
>
> (iii) the notice must be served on the plaintiff in the tortious claim within seven days after the commencement of the claim;
>
> (iv) the notice must be served on the parties who have interest in the proceedings.

[55] In the present case, the applicants knew of the Singapore suits, yet they chose not to comply with the statutory requirements laid down by the proviso to s. 96(3). There are no averments made by the deponent of the affidavit in support (encl. 2) of the OS stating that all those prerequisites listed out from (i) to (iv) above had been adhered to. Since those requirements were not adhered to, it followed that the *ex parte* order dated 21 April 2019 is irregular and unenforceable.

[56] Finally, I feel it important to highlight the fact that the OS was filed not for this particular reason. Although the entitulement mentions s. 96(1), there was no mention of s. 96(3) in the OS nor in the affidavit in support. I can only conclude that the applicants reliance on s. 96(3) is misplaced and misconceived.

The Issue Of *Forum*

[57] In this regard, I am of the considered view that the issue of *forum* raised by both parties is not one that is to be adjudicated here in the instant application. Whilst I appreciate the issue of *forum non conveniens* is an important if not the most dominant factor in the OS proceedings, I take the view it is best to be adjudicated in *inter parte* proceedings. The issue of *forum non conveniens* is a serious question and difficult questions such as this should not be determined at this stage of the proceedings. Whether the *forum non conveniens* favours proceedings in Malaysia or Singapore will have to be argued, considered and decided after the *ex parte* order is set aside and when the OS is heard *inter partes*.

Conclusion

[58] Premised on the foregoing reasons, having considered the submissions of the parties, I am satisfied that the *ex parte* order ought to be set aside. Therefore, the defendants' applications in encls. 24 and 31 are allowed with costs.

[59] I direct that a date be fixed by the Deputy Registrar for the OS to be heard *inter partes*.